APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 198

RICHARD M. SMITH,

Petitioner,

—v.—

FRED M. HOOEY, Judge,
Criminal District Court of Harris County, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR CERTIORARI FILED AUGUST 10, 1967
CERTIORARI GRANTED JUNE 17, 1968

Supreme Court of the United States

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DOCKET ENTRIES

No docket entries appear in the record, or on the records of the Supreme Court of Texas. A chronological list of the important dates of the proceedings below follows:

1. Late spring, 1967. Petition for a Writ of Mandamus filed in the Supreme Court of Texas. (The exact date does not appear of record, but the petition makes reference to a decision of the Supreme Court of Idaho handed down on April 21, 1967, and must have been subsequent to that date.)

2. June 28, 1967. Petition denied by the Supreme Court of Texas.

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

O.C. 10 Denied

RICHARD SMITH, PETITIONER

vs.

HONORABLE FRED M. HOOEY, JUDGE, CRIMINAL DISTRICT COURT NO. 6, OF HARRIS COUNTY, TEXAS, RESPONDENT

PETITION FOR A WRIT OF MANDAMUS

The Verified Petition For A Writ Of Mandamus Respectfully Shows Unto This Honorable Court As Follows:

1. That the County Prosecutor of Harris County Texas caused a warrant and complaint to be filed against the petitioner charging petitioner with theft under the criminal statutes of the State of Texas, and;

2. On November 3, 1960, petitioner filed with the respondent Court his motion for speedy trial which motion was completely ignored by the respondent and the County Prosecutor, and;

3. For over a period of six years petitioner has attempted to gain a speedy trial in the respondent's Court which requests have been ignored by the respondent and the County Prosecutor, and;

4. On April 17, 1967, petitioner filed in the respondent's Court his verified motion to dismiss such charge for want of prosecution, and;

5. The County Prosecutor mailed to petitioner a copy of the Court docket order showing that trial was set for March 31, 1967, No. 90,871, and;

6. That no disposition has been made by the respondent on the motion to dismiss for want of prosecution and petitioner has lost contact with the Court as well as the County Prosecutor, and;

7. Petitioner alleges there cannot now be a speedy trial within the meaning of the Sixth Amendment to the United States Constitution and the Constitution and Statutes of the State of Texas; so as to satisfy the requirement of

due process of law as guaranteed to him by the Fourteenth and Fifth Amendments to the United States Constitution, in that:

The Supreme Court of the United States in *Klopfer* v. *North Carolina*, —— U.S. ——, 87 S.Ct. 988, 18 L.Ed. (2d) —— held that an accused was entitled to a speedy trial and that each of the 50 States guarantees the right to a speedy trial to its citizens. The Supreme Court in the Klopfer decision decided March 13, 1967, said:

> "That this right was considered fundamental at this early period in our history is evidenced by its guarantee in the Constitions of several of the States of the new nation," (Citations in the footnote), as well as by its prominent position in the Sixth Amendment. Today, each of the 50 States guarantees the right to a speedy trial to its citizens.
>
> "The history of the right to a speedy trial and its reception in this country clearly establishes that it is one of the most basic rights preserved by our Constitution."

In Richerson vs. State of Idaho, No. 9751, January Term, 1967, opinion filed on April 21, 1967, the Supreme Court of Idaho, citing Klopfer v. North Carolina, supra, among numerous other decisions, reversed the lower Court in refusing to dismiss charges where the facts disclosed that the accused had been denied a speedy trial. The Supreme Court in the Richerson case, supra, citing State ex rel. Fredenberg v. Byrne, 123 N.W. (2d) 305 (Wisc., 1963), discussed the fact that the accused's own actions caused him to be outside the jurisdiction as follows:

> "* * * Although the imprisonment of the petitioner at Sandstone is his own fault that in itself does not excuse the state's long delay in bringing him to trial in the absence of a showing that the state was unable to obtain his return for trial. Moreover, the effect of a detainer warrant at Sandstone prison may in some cases result in a loss of privileges such as assignments outside the prison walls or may necessitate 'cell housing' or possible transfer to a penitentiary." 123 N.W. (2d) at 309.

In Commonwealth v. McGrath, 205 N.E. (2d) 710 (Mass., 1965), that Court stated:

> "The decisions which have adopted a contrary position are unconvincing. Some of them reason that a state need not request the delivery of a person incarcerated elsewhere because it cannot demand his custody as a matter of unqualified right. But we fail to see why the lack of an absolute right excuses the exercise of due diligence. Other decisions are based on the motion that the defendant's absence from the jurisdiction is the results of his own wrongdoing. This, however, is not a situation where the accused is voluntarily remaining without the Commonwealth. Nor is it a case where the Federal authorities have refused to release him. * * * Here, the delay in the trial of the defendant for a crime of which he is presumed innocent can be prevented." 205 N.E. (2d) at 714.

It is respectfully submitted that the County Prosecutor of Harris County, Texas has not shown good faith and the delay of the trial in the case at bar must be attributed to the state. For reasons above stated and upon the authorities cited herein the right to a speedy trial has been denied to petitioner and he is entitled to have the charge dismissed.

Wherefore, petitioner respectfully prays that this Honorable Court issue a rule to show cause directed to the Honorable Fred M. Hooey, Judge, of the Criminal District Court No. 6 of Harris County, Texas, commanding the said respondent to show cause, returnable before the bar of this Honorable Court, on a day to be made certain therein, why the charge should not be dismissed, and why a writ of mandamus should not be granted herein directing the said respondent Court to dismiss the charge therein pending against petitioner.

Respectfully submitted,

(RICHARD M. SMITH)
RICHARD M. SMITH
Petitioner
Box 1000
Leavenworth, Kansas 66048

DENIAL OF WRIT

THE SUPREME COURT OF TEXAS
CAPITOL STATION
AUSTIN, TEXAS
78711

June 28, 1967

Robert W. Calvert
Chief Justice
Meade F. Griffin
Clyde E. Smith
Ruel C. Walker
James R. Norvell
Joe Greenhill
Robert W. Hamilton
Zollie Steakley
Jack Pope
Associate Justices

Garson R. Jackson
Clerk

Mr. Richard M. Smith
No. 77644-L
United States Penitentiary
Leavenworth, Kansas 66048

Dear Sir:

The Supreme Court of Texas has this day denied your Petition for Writ of Mandamus.

We cite you to *Cooper* v. *State*, 400 S.W.2d 890 (1966), and to *Lawrence* v. *State of Texas*, 412 S.W.2d 40 (1967). We are enclosing a copy of the Per Curiam Opinion in the latter case.

Very truly yours,

(M. W. BERTRAM)
M. W. BERTRAM
Administrative Assistant

Copy of Per Curiam Opinion enclosed

IN THE SUPREME COURT OF TEXAS

No. A-11,760

DONALD WAYNE LAWRENCE, RELATOR

v.

THE STATE OF TEXAS, ET AL., RESPONDENTS

ORIGINAL MANDAMUS PROCEEDING
PER CURIAM

This is an original proceeding in this court in which relator seeks a writ of mandamus to compel

> "HONORABLE GEORGE D. TAYLOR, Judge, and the Criminal District Court of Jefferson County, Texas, to proceed to trial in Cause No. 25023 and requiring all Respondents to secure the presence of Relator at such trial by issuing a proper writ of habeas corpus ad prosequendum and causing the same to be served on the appropriate United States Marshal and the Warden of the Federal Correctional Institution at Texarkana, Texas, and by issuing such other and further orders as may be necessary to cause THE STATE OF TEXAS and Jefferson County to make necessary arrangements for payment of expenses required by the United States Marshal in the premises; or, in the alternative, directing appropriate Respondents to dismiss the indictment in Cause No. 25023 . . ."

Relator is confined in the Federal Correctional Institution at Texarkana by virtue of a sentence imposed by a United States District Court in California. He contends that the failure and refusal of respondents, Honorable George D. Taylor, Criminal District Judge of Jefferson County, Honorable W. C. Lindsey, Criminal District Attorney of Jefferson County, the Commissioners Court of Jefferson County, and Honorable R. E. Culberson, Sheriff of Jefferson County, to take all necessary steps to obtain his production and to bring him to trial on the felony

indictment pending against him in Jefferson County is an infringement of his constitutional right to a speedy public trial.

We had occasion to consider and decide this exact question in Cooper v. State, 400 S.W.2d 890 (1966). A majority of the Justices of the court adhere to the views there expressed, and the petition for writ of mandamus is accordingly denied. The four Justices who dissented in *Cooper* adhere to the views expressed in the dissenting opinion in that case and for the reasons there stated would grant the writ in this case.

Opinion delivered:

March 8, 1967

STIPULATION OF COUNSEL

IN THE SUPREME COURT OF THE UNITED STATES

[Caption omitted in printing]

The parties in the above-entitled case, through their counsel, stipulate and agree as follows:

1. That the facts set forth in Respondent's Response to the Petition for Certiorari may be taken as true, and that those facts would have been before the Texas Supreme Court if it had ordered a Response to the Petition for Mandamus.

2. That on April 13, 1960, Petitioner was sentenced to the custody of the Attorney General of the United States for a period of ... een years and is still in such custody.

3. That there are no docket entries or formal order denying the petition in the records of the Texas Supreme Court and that the order of the Texas Supreme Court is sufficiently evidenced by the letter from M. W. Bertram.

4. That the appendix to be printed for the Supreme Court of the United States shall consist of the following documents: Petition for Writ of Mandamus; letter of June 28, 1967, from M. W. Bertram to Petitioner; and this Stipulation.

(CHARLES ALAN WRIGHT)
CHARLES ALAN WRIGHT
Attorney for Petitioner

(JOE S. MOSS)
JOE S. MOSS
Assistant District Attorney
Harris County, Texas
Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

No. 495 Misc., October Term, 1967

RICHARD M. SMITH, PETITIONER

v.

FRED M. HOOEY, Judge,
Criminal District Court of Harris County, Texas

On petition for writ of Certiorari to the Supreme Court of the State of Texas.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 17, 1968

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1536 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 320638 - 215

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 198

RICHARD M. SMITH,

Petitioner,

—v.—

FRED M. HOOEY, Judge, Criminal District Court of Harris County, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 198

RICHARD M. SMITE,

Petitioner,

—v.—

FRED M. HOOEY, Judge, Criminal District Court of Harris County, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE PETITIONER

Opinions Below

The Supreme Court of Texas wrote no opinion in this case. The letter from the Supreme Court of Texas advising petitioner of the denial of the petition does refer to two earlier opinions of that court, and is reprinted in the Appendix (A. 5).

Jurisdiction

The petition for writ of mandamus in the court below, in which petitioner's claim under the Sixth and Fourteenth Amendments was properly presented (A. 2-3), was denied by the Texas Supreme Court on June 28, 1967 (A. 5). The petition for a writ of certiorari was filed August 10, 1967, and granted June 17, 1968. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

Constitutional Provisions and Statutes Involved

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States; nor shall any State deprive any reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of hte United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4085 of the Criminal Code (18 U.S.C.) provides:

> (a) Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release to be transferred to a penal or correctional institution within such State or District. If more than one such request is presented in respect to any prisoner, the Attorney General shall determine which request should receive preference.
>
> The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."
>
> (b) This section shall not limit the authority of the Attorney General to transfer prisoners pursuant to other provisions of law.

Questions Presented

1. Does the Speedy Trial Clause of the Sixth Amendment, in conjunction with Fourteenth Amendment, impose an obligation on a state to make a reasonable effort to obtain temporary custody of a federal prisoner in order that he may be tried on state charges pending against him?

2. Does the Constitution require dismissal of a state criminal charge that has been pending for more than seven

years in the absence of an adequate excuse for the state's failure to give the defendant a speedy trial on that charge?

Statement of the Case

The present case arises out of an indigent prisoner's *pro se* petition for a writ of mandamus in the Texas Supreme Court. The state court denied the petition without opinion or formal order. The record, therefore, is not extensive. Nevertheless it is believed that it is sufficient for decision of the narrow issues the case presents. In his Response to the Petition for Writ of Certiorari, respondent gave a fuller account of the factual background to the case. It has been stipulated by counsel for the parties that the facts set out in respondent's Response are true, and that they would have been before the Texas Supreme Court if it had ordered a response to the petition for mandamus (A. 8). The Response of respondent is reprinted, for convenience of the Court, as Appendix A to this brief (see Response below). In the text of this Statement of the Case, only those facts are stated that can be deduced from the papers actually before the Supreme Court of Texas. In order that the Court may have a fuller understanding of the factual background from which the case arises, other facts appearing in respondent's Response are noted in the footnotes.

Petitioner was charged in Harris County, Texas, with theft (A. 2).* He was at that time, and still is, a prisoner

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*The indictment, returned March 14, 1960, charged petitioner and another person with theft by false pretext on or about May 26, 1959 (see Response below).

in the federal penitentiary in Leavenworth (A. 4-5).[2] Shortly after the state charge was filed against him, petitioner filed with the respondent court his motion for a speedy trial but this was ignored by the court and the prosecutor (A. 2).[3] Thereafter for over six years petitioner attempted unsuccessfully to gain a speedy trial in respondent's court (A. 2).[4] On April 17, 1967, petitioner filed in respondent's court a verified motion to dismiss the state charge for want of prosecution but no disposition of this has been made by respondent (A. 2). In the late spring of 1968, petitioner sought mandamus from the Supreme Court of Texas[5] to compel respondent to dismiss the charge for want of a speedy trial (A. 1-4). On June 28, 1967, the Texas court advised petitioner that his petition had been denied (A. 5). In accordance with the usual practice of the Texas Supreme Court on prisoner petitions of this kind, no formal order was made (A. 8).

The petition for certiorari was filed in this Court on August 10, 1967. On March 4, 1968, the Court invited the Solicitor General to file a brief expressing the views of the United States. 390 U.S. 937 (1968). The Solicitor General did file a memorandum in response to that invita-

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[2] On May 5, 1960, the sheriff notified the warden at Leavenworth that a warrant of arrest was outstanding, and asked for notice of "the minimum release date," which is believed to be January 5, 1970 (see Response below).

[3] The petition in the court below gives the date of this motion as November 3, 1960 (A. 2). The Response gives it as March 17, 1961 (see Response below).

[4] The Response states: "Since that time, by various letters, and more formal so called 'motions', petitioner has asked either for a speedy trial or dismissal of the indictment" (see Response below).

[5] The petition was filed with the "Texas Criminal Court of Appeals," and was referred by it to the Supreme Court of Texas, the court with jurisdiction in such matters.

tion, and, for the convenience of the Court, that memorandum is reprinted as Appendix B to this brief, see Response below. On June 17, 1968, the Court granted the motion for leave to proceed in forma pauperis and granted the petition for certiorari. 392 U.S. 925 (1968).

Summary of Argument

1. A state charge has been pending against petitioner since 1960. His efforts to obtain trial on that charge have been unsuccessful. The state has failed to try him only because he has been confined in a federal penitentiary. The Texas view, announced in two recent decisions of the Supreme Court of Texas, is that the state is under no obligation to make any effort to provide a speedy trial on a state charge so long as the defendant is in the custody of another sovereign.

2. Postponement of trial on a state charge while the defendant is in a federal prison, or the prison of another state, is seriously prejudicial to the defendant. The passage of time makes it more difficult for him to defend against the state charge when he is ultimately brought to trial. Any possibility of concurrent sentences on the state charge and on the charge for which defendant is already imprisoned is defeated. The harm to the defendant is aggravated when, as is common, the state authorities have filed a detainer against the defendant with the authorities at the prison in which he is confined. In the federal system the presence of a detainer is a factor to be considered in determining whether to grant parole to a prisoner and what privileges to extend to him while he is in prison. In some states the presence of a detainer is an absolute bar

to parole and to prison privileges. These adverse consequences exist even though a high proportion of detainers are of a "nuisance" type and are not followed up by prosecution after the prisoner is released.

Delay of the trial of the state charge may hurt the state, by weakening its case. Since the state has an option whether to try the defendant immediately or to await completion of his other sentence, there is risk that this option will be exercised selectively.

Finally, the pendency of an untried charge makes the rehabilitation process extremely difficult. Experienced penal authorities and responsible professional groups agree that it is undesirable from every point of view to keep a charge pending rather than providing defendant with a speedy trial on that charge while he is imprisoned elsewhere.

3. Although decisions of lower state and federal courts are about equally divided on the matter, on principle it should be held that the constitutional obligation of a state to provide a speedy trial for criminal defendants requires, in the case of a defendant confined in another jurisdiction, that the state make a reasonable and good-faith effort to obtain the presence of the defendant so that he may be promptly tried. The issue is indistinguishable in principle from that decided in *Barber* v. *Page*, 390 U.S. 719 (1968), where it was held that the Confrontation Clause of the Sixth Amendment bars a state from using against a defendant testimony of a witness at a prior hearing, if the witness is now in prison in another jurisdiction, unless the state has failed in a good-faith effort to have the other jurisdiction make its prisoner available to testify at the

trial. No less should be required of a state in meeting its obligations under the Speedy Trial Clause than is demanded of it under the Confrontation Clause.

4. If Texas had requested the Bureau of Prisons to make petitioner available for trial on the state charge, he would have been produced for this purpose. Instead the state made no effort of any kind. It is now more than eight years since the state indictment was returned against him and more than nine years since the crime was allegedly committed. Any trial at this late date would be unfair to the petitioner. The state charge should be ordered dismissed for failure to give him a speedy trial.

ARGUMENT

I.

Petitioner Has Been Denied a Speedy Trial on the State Charge Solely Because of His Federal Confinement.

The issue in this case is whether Texas has denied petitioner's right to a speedy trial on a 1960 indictment charging him with a crime allegedly committed in April, 1959. Petitioner has made repeated demands, since at least March 1961, to be brought to trial on this charge. When all of these efforts proved futile, he moved for dismissal of the charge because of the failure to provide a speedy trial. The present case arises out of the denial of that motion.

If petitioner had been at large for the last eight and a half years, and his requests for a trial had been refused, it could hardly be doubted that he would have been denied

his constitutional right. If he had been in custody in a Texas prison on some other state charge, the fact of that custody would not relieve the prosecuting authorities from their duty to give him a speedy trial. This is explicitly recognised in Texas, *State* ex rel. *Moreau* v. *Bond*, 114 Tex., 468, 271 S. W. 379 (1925), as it is by most jurisdictions.

The only justification Texas offers for its failure to bring petitioner to trial is that at all times relevant he has been in the custody of the Attorney General of the United States serving a 15-year federal sentence. In *Cooper* v. *State*, 400 S. W. 2d 890 (Tex. 1966), the Texas Supreme Court, by vote of five to four, held for the first time that federal custody is an adequate excuse for failure to try a prisoner on a Texas charge. It distinguished its own earlier decision in the *Moreau* case, requiring a speedy trial for a state prisoner, on the ground that "a different rule is applicable when two separate sovereignties are involved." *Id.* at 891. It was shown in the *Cooper* case that the United States Bureau of Prisons was willing, on request, to make Cooper available to the Texas authorities so that he might be tried. The majority of the Texas court found this of no significance.

> The question is one of power and authority and is in no way dependent upon how or in what manner the federal sovereignty may proceed in a discretionary way under the doctrine of comity. A contrary view not only seems obnoxious of one's understanding of the nature of sovereignty, but apparently embraces a theoretical anomaly. * * * The true test should be the power and authority of the state unaided by any waiver, permission or act of grace of any other au-

thority. This seems to be the majority rule and we adhere to it.

Id. at 892.

The Texas Supreme Court reaffirmed its holding in *Cooper*, again by vote of five to four, in *Lawrence* v. *State*, 412 S.W.2d 40 (1967), *certiorari denied* 389 U.S. 920 (1967). Since that decision all applications of this kind from federal prisoners have been denied, as this one was, without formal order of the court, and prisoners have been advised of the denial by letter from the Administrative Assistant, referring them to the *Cooper* and *Lawrence* decisions.

II.

Refusal to Provide a Speedy Trial on State Charges to a Person Confined in Another Jurisdiction Is Prejudicial to the Prisoner, to Law Enforcement, and to the Correctional Process.

The issue in this case, although narrow, is of great practical importance. A comprehensive recent study reports that, as of 1964, 3500 federal convicts, 15% of the entire federal prison population, had one or more detainers filed against them, while among the more serious offenders the figure ran as high as 30%. Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L. J. 767 n. 1 (1968). High proportions exist also for at least some of the states. *Ibid.*

To hold, as Texas does, that a charge may be kept pending for many years while the defendant serves a prison sentence in another jurisdiction, and that he may be brought

to trial on that charge after his release by the other jurisdiction, is surely prejudicial to the prisoner whose trial is delayed.

> A convict is subject to the anxiety of a pending charge, and his defense is equally jeopardized by bringing him to trial after serving a long sentence when his witnesses may be unavailable. In fact, prejudice to the convict's defense may be increased because an imprisoned defendant "is less able on that account to keep posted as to the movements of his witnesses, and their testimony may be lost during his continual confinement." Moreover, serving a sentence inflicts upon him an additional punishment not levied by the formal judicial process.

Note, *The Lagging Right to a Speedy Trial*, 51 Va.L.Rev. 1587, 1607 (1965).

Delay prejudices a prisoner in another way. If a defendant is convicted of several offenses by a single jurisdiction, concurrent sentences are both common and desirable. It is possible for state and federal sentences from more than one state to be similarly served. Bennett, *"The Last Full Ounce,"* 23 Federal Probation, No. 2, 20, 21-22 (1959); Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U.Cin.L.Rev. 179, 182-183 (1966); Note, 77 Yale L.J. 767, 770 (1968). This cannot be done if a state charge has not been tried, and remains pending until a sentence elsewhere has been completed.

Although prisoners are harmed by delay in trial of pending charges, the harm is aggravated when, as is common; the jurisdiction in which the charge is pending has filed a detainer with the authorities in the jurisdiction in which

the prisoner is confined. In some states parole is automatically denied to a prisoner against whom there is a detainer. Tappan, *Crime, Justice and Correction* 724 (1960); Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417, 420 n. 17. This rule was abandoned in the federal system in 1954, and a prisoner otherwise eligible for parole may, in the discretion of the Board of Paroles, be released to the custody of an official who has filed a detainer. 28 C.F.R. § 2.9. See *Rules of the United States Board of Parole* 17-18 (1965), where it is said that the presence of a detainer does not prevent a federal prisoner from being paroled, but that the detainer may be considered by the Board of Parole in determining whether to grant parole.

In many prison systems a convict subject to detainer is denied prison privileges available to other inmates. "He may be held under maximum security, and may be denied many opportunities which other prisoners have: for example, transfer to a minimum security area, the privilege of becoming a trusty, or assignment to any job which involves some degree of trust." Note, 1966 Wash. U.L.Q. 417, 418-419. See also *United States* v. *Candelaria*, 131 F.Supp. 797, 799 (S.D.Cal. 1955), Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U.Cin.L.Rev. 179, 181 (1966). In a recent case the Kansas Supreme Court held that Kansas was under no obligation to try a person on a charge there while he was serving a 15-year sentence in Washington even though the filing of the detainer warrant blocked his opportunities for clemency or conditional parole on the Washington sentence and prohibited him from taking part in many rehabilitation programs or becoming a trusty. *Evans* v. *Mitchell*, 200 Kan. 290, 436 P.2d 408 (1968). In the federal prisons there is no longer a flat rule about

extending privileges to prisoners against whom detainers have been lodged. Each prisoner is considered individually "but there remains a tendency to consider them escape risks and to assign them accordingly. In many instances this evaluation and decision may be correct, for the detainer can aggravate the escape potentiality of a prisoner." Bennett, *"The Last Full Ounce,"* 23 Federal Probation, No. 2, 20, 21 (1959).

These adverse consequences to the prisoner are especially difficult to justify when, as the Reporters for the Model Penal Code have estimated, as many as 50% of the detainers that are lodged against prisoners are of a "nuisance" type that there is no intent to execute. A.L.I., *Model Penal Code* 130 (Tent.Dr.No. 5, 1956). The Tenth Circuit has also declared it to be "common knowledge that relatively few detainers on federal inmates are followed by prosecution." *Huston* v. *State of Kansas*, 390 F.2d 156, 157 (10th Cir. 1968). "The nuisance value of detainers is illustrated by the 211 detainers lifted at Leavenworth during the year, usually about the time the prisoners involved were finishing their sentences." Bennett, *"The Last Full Ounce,"* 23 Federal Probation, No. 2, 20, 21 (1959). In that same year detainers were executed against only 114 prisoners at Leavenworth. *Ibid.* As a commentator has noted, "punitive motives often predominate. One prosecutor wrote that a convict could 'sit and rot in prison' rather than be brought promptly to trial in the prosecutor's jurisdiction." Note, 77 Yale L.J. 767, 772 (1968).

It is not only the prisoner who is disadvantaged if his trial is delayed. The state is also prejudiced if in fact it seriously intends to try the defendant when he has completed service of his other sentence. Chief Justice Taft's

observations for this Court in *Ponzi* v. *Fessenden*, 258 U.S. 254, 266 (1922), have not lost their force with the passage of the years.

> Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with duty of prosecution.

The same point has recently been made by the Florida Supreme Court:

> The clamor of the public for action, and the interest of the prosecution's witnesses and of prosecution officers themselves wanes with the passage of time as does the memory of witnesses to the crime. Therefore, if this state does in fact intend to try the Florida charges represented by a detainer warrant lodged against an accused who is held elsewhere the public interest in the successful enforcement of the criminal laws of the state dictates that the trial be had as quickly as it can be arranged.

Dickey v. *Circuit Court*, 200 So.2d 521, 527 (Fla. 1967).

Of course it may be said that the state can always avoid this disadvantage by making a request that the prisoner be returned for trial, and thus that if it is harmed by delay, it has only itself to blame. But to leave the matter in the option of the state permits the state to delay cases selectively, trying immediately those cases in which it is seriously interested in conviction and is fearful of erosion of its case, while doing nothing about cases in which its evidence is inconsequential or otherwise not likely to erode, as well as those cases in which the detainer is lodged only for harassment purposes to oppress the prisoner.

There is a final consideration of very great importance. The dominant theme in modern penology is rehabilitation of the offender in order that he may become a useful member of society. It is widely recognized by those experienced in these matters that the pendency of an untried charge, especially when aggravated by a detainer, makes the planning of rehabilitation programs extremely difficult and hampers the rehabilitation process. *Dickey* v. *Circuit Court*, 200 So.2d 521, 527 (Fla. 1967); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 Wash. U.L.Q. 243, 295; Donnelly, *The Connecticut Board of Parole*, 32 Conn. B.J. 26, 45-48 (1958); Walther, *Detainer Warrants and the Speedy Trial Provision*, 46 Marq.L.Rev. 423, 428 (1963).

The St. Louis Circuit Court Probation Department made a survey of state and federal correctional authorities to appraise the current feeling toward detainers. Its report is quoted in Note, 1966 Wash. U.L.Q. 417, 421 n. 22:

> Without exception, it was the opinion of the wardens, administrators, and directors of the departments of corrections, that detainers are a profound problem in custody, treatment and care. Throughout the responses from these men, who have the awesome responsibility for the creation of an atmosphere of hope and rehabilitation for their inmates, we found a feeling of frustration and handicap in meeting this responsibility for those inmates with detainers.

Similarly the Administrators of the Interstate Compact for the Supervision of Parolees and Probationers have published an extensive discussion, quoted in *United States* v. *Candelaria*, 131 F.Supp. 797, 805-806 (S.D.Cal. 1955),

showing how the detainer system hampers the prison administrator, the inmate, and the sentencing judge.

Valuable papers on this subject by Judge Carroll C. Hinkle, James V. Bennett, and Sanford Bates appear in 9 Federal Probation, No. 3 (1945). Mr. Bennett, for years the distinguished Director of the Federal Bureau of Prisons, observed, at 10, that the detainer system causes inmates to become embittered, and in that way defeats the most important objective of the correctional system. Mr. Bates, formerly Superintendent of United States Prisons and at the time of writing, Commissioner of the New Jersey Department of Institutions and Agencies, described, at 17, the problem detainers create for the parole board.

> The parole board, when the case comes before it for decision, is completely in the dark; first, as to whether prosecution is to be undertaken at all; and second, as to the amount of sentence which may be imposed in the event that prosecution is undertaken and the defendant found guilty. One of the essential and indispensable elements of good parole is that a program should be arranged in advance of release. The parole board must be assured of employment which is bona fide and suitable to the man being released, and also it must be satisfied that he is to have as good a home as is possible under the circumstances. If the board does not know whether the man is to serve more time or not, it is difficult to arrange such a program. We have no business to annoy employers by importuning them for a job for an inmate and then not having the inmate show up as promised.

That the detainer system is undesirable from every point of view has been recognized by responsible professional groups. The American Bar Association Project on Minimum Standards for Criminal Justice has proposed that the prosecutor be required to attempt to have a prisoner in the custody of another jurisdiction returned for a speedy trial. A.B.A. Project, *Standards Relating to Speedy Trial* § 3.1 (Tent. Dr. 1967). In the Commentary on that proposal it notes that 19 states have adopted the Interstate Agreement on Detainers. *Id.* at 18 n. 2. That agreement was prepared and is supported by the Council of State Governments, and is intended to facilitate speedy trial of a prisoner confined elsewhere. Council of State Governments, *Suggested State Legislation Program for 1958* 81-91 (1957). It has been endorsed by the American Bar Association. 87 A.B.A. Rept. 467-468 (1962). Other states have addressed themselves to the problem, as in California where a statute makes it mandatory that a district attorney inquire of a federal warden for permission to try a federal prisoner, and requires dismissal of the state charge if trial is not had within 90 days of consent by the federal warden. Cal. Penal Code, § 1381.5. See generally Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rutgers L. Rev. 828 (1964).

That it is desirable practice either to give a prisoner in some other jurisdiction a speedy trial or else dismiss the charge against him can hardly be denied. The next section considers whether this desirable practice is required by the Constitution.

III.

The Sixth and Fourteenth Amendments Require a State to Make a Good Faith Effort to Give a Speedy Trial to a Federal Prisoner.

Until 1955 it was clearly the law that while a state might arrange with the federal government or that of another state to have a prisoner confined elsewhere produced for trial on a state charge, it was under no obligation to do so. This is still the law in a significant number of states. *Ford v. Presiding Judge, Twentieth Judicial Circuit*, 277 Ala. 83, 167 So. 2d 166 (1964); *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938); *Petition of Norman*, 55 Del. 109, 184 A. 2d 601 (1962); *Evans* v. *Mitchell*, 200 Kan. 290, 436 P.2d 408 (1968); *Ruip* v. *Knight*, 385 S.W. 2d 170 (Ky. 1964); *Bates* v. *State*, —— Nev. ——, 436 P. 2d 27 (1968); *Quinlan* v. *Bussiere*, 106 N.H. 527, 214 A.2d 877 (1965); *Commonwealth* v. *Harmon*, 21 Pa. D. & C.2d 251 (Cumberland Co. 1960); *Burton* v. *State*, 214 Tenn. 9, 377 S.W.2d 900 (1964); *State* v. *Clark*, 392 P.2d 539 (Wyo. 1964).

The last holdings of the Minnesota Supreme Court are also to this effect—*State* v. *Larkin*, 256 Minn. 314, 98 N.W.2d 70 (1959); *State* v. *Hall*, 266 Minn. 74, 123 N.W.2d 116 (1963)—thought in a more recent case that court has commented favorably on decisions elsewhere reaching a contrary result. *State* ex rel. *La Rose* v. *Gronquist*, 273 Minn. 231, 140 N.W.2d 700 (1966). The issue was not squarely presented in the *La Rose* case, however, and the court found it unnecessary to decide whether to adhere to its earlier holdings.

Oklahoma also follows the older rule, *Dreadfulwater* v. *State*, 415 P.2d 493 (Okl. Cr. 1966), but with the stated

variant that a federal prisoner can insist on trial on an Oklahoma charge if he puts up funds for his trip to Oklahoma and his return to the federal penitentiary. *Hereden* v. *State*, 369 P.2d 478, 479 (Okl.Cr. 1962); *Auten* v. *State*, 377 P.2d 61 (Okl.Cr. 1962).

The older view, then, represents the law today in at most twelve states. Since Arkansas broke the ice in 1955, and held that the state must exercise due diligence to attempt to procure a person from a Texas prison for trial, *Pellegrini* v. *Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955), there has been much movement away from the older rule. The following jurisdictions, in addition to Arkansas, now hold that confinement by another jurisdiction does not excuse failure to provide a speedy trial unless the state authorities have tried unsuccessfully to obtain the prisoner for trial. *State* v. *Heisler*, 95 Ariz. 353, 390 P.2d 846 (1964); *Barker* v. *Municipal Court*, 64 Cal.2d 806, 415 P.2d 809 (1966); *Dickey* v. *Circuit Court*, 200 So.2d 521 (Fla. 1967); *Richerson* v. *State*, 91 Idaho 555, 428 P.2d 61 (1967); *People* v. *Bryarly*, 23 Ill.2d 313, 178 N.E.2d 326 (1961); *Commonwealth* v. *McGrath*, 348 Mass. 748, 205 N.E.2d 710 (1965); *State* v. *Patton*, 76 N.J.Super. 353, 184 A.2d 655 (1962), affirmed on opinion below, 42 N.J. 323, 200 A.2d 493 (1964); *People* v. *Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808 (1967); *State* v. *Johnson*, 13 Ohio Misc. 79, 231 N.E.2d 353 (C.P. Hamilton Co. 1967); *State* v. *Evans*, —— Or. ——, 432 P.2d 175 (1967); *State* ex rel. *Fredenberg* v. *Byrne*, 20 Wis. 2d 504, 123 N.W.2d 305 (1963). In Maryland the issue has been discussed in five decisions in the last 11 years but never resolved, although the most recent decision assumes without deciding that the state is under a duty to attempt to bring back prisoners held elsewhere. *Stevenson* v. *State*, —— Md. App. ——, 241 A.2d 174 (1968). Thus there are

at least twelve jurisdictions, and perhaps thirteen, where the fact of imprisonment elsewhere does not defeat a defendant's right to a speedy trial.

The federal decisions are also quite divided. A comparatively early case holding that confinement in another jurisdiction does not excuse failure to provide a speedy trial is *Taylor* v. *United States*, 238 F.2d 259 (D.C. Cir. 1956). The most-cited decision, in both state and federal courts, for the opposite and older point of view is *McCary* v. *State of Kansas*, 281 F.2d 185, 187 (10th Cir. 1960), though the language there was plainly dictum, since no question of conflicting sovereignties was involved. More recently the Tenth Circuit has again said that a state is not constitutionally compelled to bring a defendant to trial on state charges while he is confined in a federal penitentiary, though it said that "the need for a prompt trial on all charges and for all prisoners is apparent in view of the expanding use and sometimes abuse of the detainer warrant." *Huston* v. *State of Kansas*, 390 F.2d 156, 157 (10th Cir. 1968). The Fifth Circuit believes that it has been "uniformly held that whether a state shall invoke comity to obtain a federal prisoner for trial upon a state charge is a matter within its discretion * * *." *Henderson* v. *Circuit Court*, 392 F.2d 551, 552 (5th Cir. 1968). The Fourth Circuit, however, observes that

> in recent years, a rapidly expanding number of state and federal cases have produced a clear trend rejecting this doctrine and demanding a showing of due diligence by prosecutors to secure the presence for trial in their own jurisdiction of an accused imprisoned or held for a substantial period in another jurisdiction.

Pitts v. State of North Carolina, 396 F.2d 182, 185-186 (4th Cir. 1968).

The court there held that a state's failure to take even the slightest step to try a prisoner confined in another jurisdiction constituted a patent violation of his Sixth Amendment right, entitling him to discharge on habeas corpus. There are other federal decisions, but they are less fully reasoned, and no more conclusive, than those just cited.

Viewed on principle the matter seems much less doubtful than the divided state of the precedents would suggest. The arguments in favor of the older rule rest on "anachronistic" notions of sovereign dignity and on "conceptualism and lingering fictions." Note, 77 Yale L.J. 767, 772 (1968). One argument is that relied on by the Texas Supreme Court in *Cooper* v. *State*, 400 S.W.2d 890, 892 (Tex. 1966), that the matter stems from "the nature of sovereignty" and that the test of whether the state has complied with its duty to provide a speedy trial turns on "the power and authority of the state unaided by waiver, permission or act of grace of any other authority." The argument is that since the state has no absolute right to obtain custody, it need make no request. This was effectively answered by Justice Spalding, speaking for the Supreme Judicial Court of Massachusetts, when he said that "we fail to see why the lack of an absolute right excuses the exercise of due diligence." *Commonwealth* v. *McGrath*, 348 Mass. 748, 753, 205 N.E.2d 710, 714 (1965).

A second argument for the older rule is that the delay in the trial is not the fault of the state but of the defendant. The right to a speedy trial, on this view, is not denied "where the accused, by his own act, makes his trial impossible by absenting himself from the sovereign's juris-

diction and by engaging in other crimes which result in his confinement in another sovereign's prison system." *State* v. *Larkin*, 256 Minn. 314, 315, 98 N.W.2d 70, 71 (1959). See also *State* v. *Clark*, 392 P.2d 539, 541 (Wyo. 1964). The argument is literally untrue in many cases, since the state defendant confined in a federal penitentiary frequently will not have left the state's jurisdiction, and indeed very commonly the state charge will grow out of the precise incident for which he is serving the federal sentence. Even where the defendant did actually go to another state, to speak of this as making the trial "impossible" is fictive talk. As Justice Schaefer wrote for the Illinois Supreme Court:

> "The constitutional guaranty of a speedy trial contemplates that the means that are available to meet its requirements shall be utilized. * * * Although the defendant wrongfully left the jurisdiction of the court, the prosecution knew where he was and could have initiated proceedings to return him to Illinois for trial."

People v. *Bryarly*, 23 Ill. 2d 313, 319, 178 N.E.2d 326, 329 (1961).

There is finally the argument that to try a prisoner being held in another jurisdiction will cost the state money for transportation of the prisoner. This is perhaps most clearly reflected in the Oklahoma decisions, discussed earlier, holding that a federal prisoner can obtain a trial on state charges if he tenders sufficient funds to pay the cost of returning him to the state. *Hereden* v. *State*, 369 P.2d 478, 479 (Okl.Cr.1962); *Auten* v. *State*, 377 P.2d 61 (Okl. Cr. 1962). To this the answer of the Wisconsin Supreme

Court should be sufficient: "We will not put a price tag upon constitutional rights." *State* ex rel. *Fredenberg* v. *Byrne*, 20 Wis. 2d 504, 512, 123 N.W.2d 305, 310 (1963). See also Note, 77 Yale L.J. 767, 773 (1968).

Neither separately nor together do the arguments in favor of the older rule justify denying a citizen, merely because he is in custody in another jurisdiction, "one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina*, 386 U.S. 213, 223 (1967).

Three recent decisions of this Court seem to be enough to settle the matter. One is the *Klopfer* case, just cited, in which the Court held that the right to a speedy trial, secured by the Sixth Amendment, is binding on the states by virtue of the Fourteenth Amendment. Another is *Mathis* v. *United States*, 391 U.S. 1 (1968), with its clear implication that one in custody for one offense does not thereby forfeit his constitutional rights with regard to other charges that may be made against him.

Most closely in point is *Barber* v. *Page*, 390 U.S. 719 (1968), in which the Court held that a person confined in a federal prison in Texas was not "unavailable" for a state trial in Oklahoma so as to make applicable the exception to the hearsay rule for testimony at a prior hearing. The Court recognized that some credence had been given to the theory that the hearsay exception applied if a witness was out of the jurisdiction since the trial court was helpless to compel his attendance. The Court answered that argument, at 723, as follows:

> Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and

> between the States and the Federal Government has largely deprived it of any continuing validity in the criminal law.

These words could appropriately be used with regard to the argument that a person who commits a crime elsewhere, and is confined in another jurisdiction, has made it "impossible" for the state to give him a speedy trial.

The Court continued its discussion in *Barber* in language that fully fits the present case.

> In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." 381 F.2d, at 481. In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.

Id. at 724-725.

The fact that a witness is confined in a prison in another state does not justify infringement of a defendant's rights under the Confrontation Clause of the Sixth Amendment unless the prosecution has failed in good-faith effort to obtain the witness for the trial. By a parity of reasoning,

the fact that a defendant is confined in a prison in another state cannot justify infringement of his rights under the Speedy Trial Clause of the Sixth Amendment unless the prosecution has failed in good-faith effort to obtain the defendant for trial.

IV.

The Constitutional Right of a Speedy Trial Has Been Denied to This Petitioner.

If the rule contended for in the preceding section of this brief is accepted, its application to the present case is easy. Petitioner has been denied a trial on a crime allegedly committed more than nine years ago. For more than seven years he has been demanding trial without avail. There can be no doubt but that Texas could have tried him at any time it wished to do so. Congress wisely established a procedure in 1940, 18 U.S.C. § 4085, by which a state may request that a federal prisoner be made available for trial, and indeed, as shown by the March, 1968, Memorandum for the United States, submitted in response to the request of this Court, it has been necessary to invoke the statute in only "a relatively small number of instances" since the Bureau of Prisons has produced prisoners in response to other less formal procedures. The Memorandum for the United States concludes:

> In short, the Bureau of Prisons would doubtless have made the prisoner available if a writ of *habeas corpus ad prosequendum* had been issued by the state court. It does not appear, however, that the State at any point sought to initiate that procedure in this case.

Texas has not made the good-faith effort to obtain the defendant for trial that the Constitution requires of it. Instead it has made no effort of any kind.

The time interval here involved is strikingly similar to that dealt with in *People* v. *Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808 (1967), in which dismissal for want of prosecution was ordered on a New York charge that had been pending for years while the defendant was in an Alabama prison. The fact that Alabama has no statute comparable to 18 U.S.C. § 4085, and that there was no assurance that Alabama would produce the prisoner, was held not to excuse failure to make an effort to obtain him. Judge Breitel wrote:

> Moreover, there is staleness in a nine-year-old charge of crime with all the consequences of difficulties of proof from the side of the defendant as well as the prosecution. To be sure, the People have the untrammeled power to institute a prosecution any time within the limitations period—at least five years in the case of this felony—but once having instituted the prosecution by detainer warrant, indictment or other initiatory process, they have the obligation of advancing it unless there is a reasonable ground for delay. Refusal by another jurisdiction to surrender the defendant would, of course, be an excuse. All that the People would have to do is to make the request, sincerely, for the surrender—a letter would do.

20 N.Y.2d at 144, 228 N.E.2d at 812.

Texas has made no effort, sincere or otherwise, to obtain petitioner for trial. The state charge against him has al-

ready been hanging over his head for far too long. A fair trial on it could hardly be had at this late date. Dismissal of the charge, as he sought in this proceeding, would permit the federal prison authorities to plan for his rehabilitation and release in a manner presently not possible. The courts below erred in denying him the relief requested.

Conclusion

For the reasons set out above, the judgment of the Texas Supreme Court should be reversed.

Respectfully submitted,

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September, 1968

APPENDIX A

Response to Petition for Certiorari

FRED M. HOOEY, Judge of the 180th District Court of Harris County, Texas (formerly named Criminal District Court Number Six of Harris County, Texas) joined herein by CAROL S. VANCE, District Attorney of Harris County, Texas, respondents in the above cause, respond to the Petition for Certiorari herein, and respectfully say:

I

Respondents are unable to ascertain from the documents served on them whether the petition is for certiorari to the Supreme Court of Texas or to the Court of Criminal Appeals of Texas (incorrectly called Criminal Court of Appeals in the petition) or both said Courts. Further, respondents were not aware of any order having been issued by either of said courts pertaining to the matters involved in this cause. Nevertheless, respondents believe they are sufficiently apprised of the relief sought herein by petitioner, and make response accordingly.

II

On the 16th day of March, A. D. 1960 the Grand Jury of Harris County, Texas returned a joint indictment against petitioner RICHARD M. SMITH and one ALLAN Q. TAYLOR accusing them jointly of the felony offense of theft by false pretext of some $42,000.00 from one Dora M. Brannan, alleged to have been committed on or about the 26th day of May, A. D. 1959, which indictment is now pending in the 180th District Court of Harris County, Texas (respondent HOOEY being Presiding Judge thereof) in Cause No. 90,871 upon the docket of said court. Pursuant to said indictment as aforesaid, warrants for the arrest of petitioner SMITH and his co-defendant TAYLOR were promptly

issued to the Sheriff of Harris County, Texas. The Sheriff became informed that petitioner was in the custody of the Attorney General of the United States at Leavenworth, Kansas, whereupon the Sheriff by letter dated the 5th day of May, A. D. 1960 notified the Warden of the United States Penitentiary at Leavenworth, Kansas of the fact that said warrant of arrest was outstanding, and asked for notice of "the minimum release date", which date is believed to be January 6, 1970.

III

By letter dated March 17, 1961 petitioner requested a speedy trial, and in reply thereto was notified that he would be afforded a trial within two weeks of any date petitioner might specify at which he could be present. Since that time, by various letters, and more formal so called "motions", petitioner has asked either for a speedy trial or dismissal of the indictment. At no time has either of these respondents received any notice of any date at which petitioner could be present for trial.

IV

These respondents are ready, willing, able and anxious to afford petitioner a trial within two weeks of any date he may specify at which he will be present.

V

Since the Attorney General of the United States may have interest in this cause, a copy of this response is being furnished him, with the thought that he may care to specify a date on which petitioner may be present for trial. In view of the fact that petitioner's co-defendant TAYLOR is likewise believed to be in the custody of the Attorney General at Atlanta, Georgia, the Attorney General may desire to make available both petitioner and his co-defendant TAYLOR on the same date for the possibility of a joint trial.

WHEREFORE, respondents pray that the petition for certiorari be dismissed or denied as to the Court may seem proper.

Respectfully submitted,

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18 U.S.C. 4085	8

Texas Statutes

Penal Code of Texas of 1925
Article 302 ---------- 7, 15

Code of Criminal Procedure of Texas of 1965
Article 13.01 ---------- 7, 15

Article 13.04 ---------- 7, 15

Texas Rules of Civil Procedure
Rule 145 ---------- 7, 16

APPENDIX B

Memorandum for the United States

By order of March 4, 1968, this Court invited the views of the United States in this case, in which petitioner has sought a writ of mandamus directed to respondent, Judge of the Criminal District Court of Harris County, Texas, to compel him to dismiss an indictment returned in that court against petitioner on March 16, 1960. Since April 1960, petitioner has been a federal prisoner in custody of the United States at Leavenworth Penitentiary, Leavenworth, Kansas. The District Attorney of Harris County, Texas, in response to the petition, states that petitioner first requested a speedy trial on March 17, 1961, and that, in reply thereto, petitioner was notified that he would be afforded a trial within two weeks of any date petitioner might specify at which he could be present. The prosecutor served a copy of his response to the instant petition upon the Attorney General "with the thought that he may care to specify a date on which petitioner may be present for trial."

It is the policy of the United States Bureau of Prisons to encourage the expeditious disposition of prosecutions in state courts against federal prisoners. The normal procedure under which production is effected is pursuant to a writ *ad prosequendum* from the state court. Almost invariably, the United States has complied with such writs and extended its cooperation to the state authorities. The Bureau of Prisons informs us that removals are normally made by United States marshals, with the expenses borne by the state authorities. In some instances, to mitigate the cost to the state, the Bureau of Prisons has removed an inmate to a federal facility close to the site of prosecution. In a relatively small number of instances, prisoners have been produced pursuant to 18 U.S.C. 4085, which provides in part:

> Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such a person, prior to his release, to be transferred to a penal or correctional institution within such State or District.

The Bureau of Prisons does not, however, consider that it is its function to determine the date of trial in a state court. Occasionally, at the request of the prisoner or upon his inquiry, the Bureau of Prisons has itself communicated with a local prosecutor, urging the disposition of pending charges and advising that the United States will produce the prisoner pursuant to a writ *ad prosequendum*. In this case, we are advised by the Bureau of Prisons that, except for a detainer filed by the sheriff of Harris County, their files reflect no correspondence from the District Attorney of Harris County with respect to petitioner. Nor did petitioner request any assistance from the United States Bureau of Prisons.

In short, the Bureau of Prisons would doubtless have made the prisoner available if a writ of *habeas corpus ad prosequendum* had been issued by the state court. It does appear, however, that the State at any point sought to initiate that procedure in this case.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1968.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 198

RICHARD M. SMITH,

Petitioner

v.

FRED M. HOOEY, JUDGE,
AND CAROL S. VANCE, DISTRICT ATTORNEY,

Respondents

On Petition for Writ of Certiorari
to the Supreme Court of Texas

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW

Petitioner's statement is correct.

JURISDICTION

Petitioner's statement is correct, but respondents submit that the record herein is wholly insufficient for this court adequately to exercise its jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner's statement is correct.

QUESTIONS PRESENTED.

Petitioner's statement is correct, to which respondents add the following questions:

1) If a financially able federal prisoner desires a speedy trial on criminal charges pending against him in a state court, does the law impose upon him the obligation to request federal authorities to transport and deliver him to the state court for trial at his own expense?

2) If a financially able federal prisoner later claims he has become "indigent" and undertakes to proceed in *forma pauperis,* in what forum (Federal or State, with either trial or appellate jurisdiction) does the state contest his factual claim of "indigency" in order to show that in truth his claim is false.

3) What notice, if any, to the state authorities must be given by a federal prisoner that he claims he is "indigent" before the state authorities must act on his claim, either by contesting its factual truth, or by admitting the truth thereof and proceeding to treat him as an "indigent?"

4) Does the failure of the federal prisoner (defendant) to notify the state authorities of his claim of "indigency" until some seven years after his federal incarceration constitute "adequate excuse" for the state's failure to proceed with him as an "indigent?"

5) Is the record before this court adequate upon which to determine the constitution claims now asserted by petitioner?

STATEMENT OF THE CASE

Petitioner's statement of the case is correct with the following modifications and additions:

1) The state denies that she had any notice that the petitioner is or was claiming to be "indigent" until

shortly after August 7, 1967, when respondents received a copy of the petition for certiorari herein. On the other hand the state believes that his claim of "indigency" is false, and can be successfully contested if the state is afforded a forum within which to do so.

2) Petitioner's motion for speedy trial was not "ignored by the court and prosecutor" (p. 5, Petitioner's Brief). Petitioner was immediately notified by letter in reply thereto that he would be afforded a trial within two weeks of any date he could specify at which he could be present. (p. 30, Petitioner's Brief.)

3) No disposition has been made of petitioner's trial court motion to dismiss, and cannot be made until petitioner is present for hearing on said motion as required by state law, if not in fact by the Constitution of The United States as well.[1]

4) Respondents agree with petitioner that the record herein is "not extensive" (p. 4, Petitioner's Brief); but disagrees with him "that it is sufficient for decision" herein. (p. 4, Petitioner's Brief.)

SUMMARY OF THE ARGUMENT

1) The petitioner himself must present himself at his own expense for speedy trial available to him within two weeks of any date he can be present.

2) If petitioner cannot present himself for trial at his own expense because he is or has become "indigent," he must notify the state of his claim of "indigency;" and until the state receives such notice the

[1] *Webb v. State*, 161 Tex. Cr. R. 442; 278 SW 2d 158, 159. Amendment VI, Constitution of the United States "In all criminal prosecutions, the accused shall * * * be confronted with the witnesses against him, * * *."

state is under no obligation to proceed with him in *forma pauperis* as an "indigent."

3) The state does not have any "option whether to try the defendant immediately or to await completion" of his federal sentence. (p. 7, Petitioner's Brief.) That "option" lies with the federal authorities.

4) The state has not placed a "detainer" against petitioner (p. 6, Petitioner's Brief), and does not desire that he be "detained;" but on the other hand by sheriff's letter dated as early as May 5, 1960 to the federal authorities asked for the "minimum *release* date"—not that petitioner be "detained."

5) The record before this court relevant to the constitutional claims now asserted is insufficient to permit decision of those claims, because no judicial determination can be made in advance whether a trial in state court would (as argued by Petitioner):

a) be "seriously prejudicial to" petitioner,

b) be difficult for petioner "to defend,"

c) defeat the possibility of "concurrent sentences,"

e) make chances for "parole diminish,"

f) restrict his "privileges" in prison,

g) "hurt the state by weakening its case," or

h) make the "rehabilitation process extremely difficult," (pp. 6 to 8, Petitioner's Brief).

6) The state trial court, with appellate procedures and almost automatic review by federal courts, is the only appropriate forum within which to develop and adjudicate petitioner's factual claims of unconstitutional denial of right to "speedy trial."

ARGUMENT

I

Petitioner Should Pay His Own Way If Financially Able

The Solicitor General informs us that "at the request of the prisoner or upon his inquiry, the Bureau of Prisons" will make the prisoner available for state court trial, but that in this case petitioner "did not request" that this be done. (p. 33, Petitioner's Brief.) The state's indictment against the petitioner indicates that at about the time of his imprisonment by the federal authorities he had just come into possession of $42,000.00 (p. 29, Petitioner's Brief), for which reason the state could not assume that the petitioner was anything but financially able to pay his own expenses to Texas for trial, especially since (so says the Solicitor General) "at his request" the federal authorities "encourage the expeditious disposition of prosecutions in state courts against federal prisoners" (p. 32, Petitioner's Brief). After receiving notice by letter in March, 1961, that he would be afforded a trial within two weeks of any date he could be present, the petitioner evidently decided his best interests did not require "expeditious disposition" of his state case. If petitioner had been at large desiring a trial, all he had to do was present himself for trial. In the case at bar for all practical purposes he was at large and could, "at his request" and with the benevolent attitude of the federal authorities, have presented himself for trial. He should not now be rewarded for failure to exercise his right obviously available to him. He has waived his right by failure to assert it.

"The constitutional right to a speedy trial is personal and may be waived by failure to assert it. * * * Just what constitutes waiver of the right is a question of fact to be determined in each case." *Fouts v. United States*, 253 F. 2d 215 (6th Cir. 1958); *Daneiger v. United States*, 161 F. 2d 299 (9th Cir. 1949) Cert. Den. 332 U. S. 769; 68 S. Ct. 81; 92 L. Ed. 2d 354.

II

If He Is "Indigent," Prisoner Must So Notify The State

The first notice the state had that petitioner was claiming to be "indigent" and wanted to proceed in *forma pauperis* was contained in the affidavit to his motion to proceed herein in *forma pauperis* on his petition for certiorari herein, a copy of which was received by respondents about the time it was filed in this court on August 10, 1967 (p. 5, Petitioner's Brief). Prior to that time respondents had not received any notice of the proceedings in the Supreme Court of Texas or "Criminal Court of Appeals" of Texas (p. 29, Petitioner's Brief). Nevertheless, according to the copy of his petition for mandamus in the Supreme Court of Texas (Appendix, pp. 2 to 4), which copy was first seen by respondents after the petition for certiorari herein had been filed as aforesaid, the petitioner did not file an affidavit that his claimed indigency had existed ever since his federal incarceration, even though it does go into some detail about the facts. He studiously and carefully swears only that "at this time" (June 21, 1967, date of affidavit) he is indigent. This executed affidavit is not contained (as it should be) in the printed appendix herein following Page 4

of the Appendix, but is believed to be on file with the clerk of this court, and if not on file, then we believe counsel for petitioner will stipulate the foregoing facts.

Texas law provides that a person unable to give security for costs may proceed in *forma pauperis* by filing affidavit of his inability,[1] the truth of which may be contested,[2] in which event the burden is on the affiant to prove the inability.[3] If the affidavit is false a prosecution for perjury could result.[4] In this case the petitioner carefully avoided making such affidavit until some seven or eight years after the alleged offense had been committed and the indictment returned against him. At last when he did file the affidavit it specifically limited its effect to his inability "at this time," which is deemed significant. He, being somewhat knowledgable about such matters, must have known that the State could successfully contest such affidavit and possibly convict him of perjury if he failed to bear his burden of proving what became of the alleged $42,000.00 in cash.

His studied delay in asserting his claim of indigency must be considered as factors bearing on his "waiver" of his right to a speedy trial.

> "Just what constitutes waiver of the right is a question of fact to be determined in each case." *Fouts* and *Danziger*, supra.

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[1]Rule 145, Texas Rules of Civil Procedure (quoted at p. 18 of this Brief).

[2]Article 302, Penal Code of Texas of 1925 as amended (quoted in full at p. 17 of this Brief).

[3]Article 13.01 Code of Criminal Procedure of Texas of 1965 (quoted at p. 17 of this Brief).

[4]Article 13.04 Code of Criminal Procedure of Texas of 1965 (quoted at p. 17 of this Brief).

III

State Has No Option When To Try Federal Prisoner

Petitioner contends that "the state has an option whether to try defendant immediately or await completion of his other sentence" (p. 7, Petitioner's Brief). The Solicitor General apparently does not agree, for his memorandum (pp. 32 and 33, Petitioner's Brief) informs us that the federal authorities "almost invariably" have delivered the prisoner for trial; that removals are "normally made by United States marshals;" that in "some instances" a prisoner is removed to a correctional institution within the requesting state; that "occasionally" the federal authorities will urge disposition of a federal prisoner pending state charge; that the federal authorities "doubtless" would have made the prisoner available on certain conditions; and that the "normal procedure" is a writ of habeas corpus *ad prosequendum* (prescribed not by federal or Texas law, but by the Bureau of Prisons).

Congress likewise does not agree that the state has any such option, because the applicable statute (18 U.S.C. 4085) orders the Attorney General to transfer the prisoner to an institution within the requesting state only *"if he finds it in the public interest to do so."* So any option of the state would be effective only "almost invariably," "normally," "in some instances," "occasionally," and if found "in the public interest" by the Attorney General. In short, the option exists with the federal authorities, not the state.

IV

State Did Not Place "Detainer" Against Petitioner

Without insisting on any definition of the word "de-

tainer" as used throughout the record and briefs herein, the facts are that the state has never asked or desired that the petitioner be "detained" by the federal authorities; but only that the state (sheriff) be informed of the "minimum *release* date" on which a warrant of arrest pursuant to a felony indictment could be executed on the petitioner (p. 30, Petitioner's Brief). If the federal authorities elect to "release" petitioner at some future date instead of immediately, the "detention" is not the act of the state. The Congress has provided that the federal jurisdiction under which this petitioner is held in custody shall not "take away or impair the jurisdiction of the courts of the several states under the laws thereof." (18 U.S.C. 3231.) To grant the relief prayed for by petitioner would be to "take away" the jurisdiction of the respondent court, not because of anything the state has done or failed to do, but because the federal authorities do not "release" petitioner to the state authorities for trial. Petitioner's cause of action for "speedy trial" should have been brought against his custodians —the federal authorities—not the state authorities who have absolutely no power to try him, "speedy" or otherwise, without the consent of his federal custodians.

V

The Insufficiency Of The Record Herein

Though the record herein demonstrates that counsel for all parties have undertaken to stipulate such facts as are known to them to have any bearing on the case at bar, they obviously do not know and are unable to stipulate to any specific facts which might be developed now at a trial of petitioner in the state court to solve

the question of whether such trial would result in a denial to petitioner of his constitutional right to a "speedy trial." With commendable candor, petitioner (through his able appointed counsel) says one result could be to "hurt the state, by weakening its case," (p. 7, Petitioner's Brief) which could hardly be said to deny to petitioner any constitutional right. Nevertheless, petitioner argues in effect that such right would be denied petitioner for various factual reasons agreed by "experienced penal authorities and responsible professional groups" (p. 7, Petitioner's Brief) to exist generally throughout the nation. But counsel cannot know which, if any, of these generally known facts would apply to a trial of petitioner. Courts cannot decide cases on opinions of "experienced penal authorities and responsible professional groups" as to what the facts will be shown to be.

> "Whether delay in completing a prosecution * * * amounts to an unconstitutional deprivation of rights depends upon the circumstances. * * * The delay must not be purposeful or oppressive." *Pollard v. United States*, 352 U. S. 354, 360; 1 L. Ed. 393, 399; 77 S. Ct. 481, 486.
>
> "* * * the (petitioner's) claim of possible prejudice in defending (himself) is insubstantial, speculative and premature. (He) mention(s) no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared. * * * In this respect, it should be recalled that the problem of delay is the (prosecution's) too, for it still carries the burden of proving the charges beyond a reasonable doubt." (Paraphrasing ours.) *United States v. Ewell*, 383 U. S. 116, 122; 15 L. Ed. 2d 627, 632; 86 S. Ct. 773, 779.

Petitioner also contends that the delay defeats "any

possibility of concurrent sentences." (p. 6, Petitioner's Brief.)

A similar contention was made in this court in *United States v. Ewell*, supra, based on an attempted retrial of defendents after serving substantial time in prison on a sentence later found to be void. This court disposed of that contention holding that "This, too, is a premature concern." and that "there is every reason to expect the sentencing judge to take the invalid incarcerations into account in fashioning new sentences if the appellees are again convicted." Texas law requires the sentence to run concurrently with a Federal sentence being served at the time of state sentence in the absence of a specific order of cumulation.

Ex parte Lawson, 98 Tex. Cr. R. 944; 266 SW 1101. The undersigned counsel respectfully represents to this court that cumulation is seldom done by the courts in Harris County, Texas. So we see that ordinarily if the petitioner were tried and convicted, and his punishment assessed at confinement for less time than remains on his Federal sentence (apparently about five more years) he would be discharged from his state sentence at the termination of his Federal sentence. In any event the contention that his trial now would defeat his chances for "concurrent sentences" was by this court held in *Ewell*, supra, to be "a premature concern."

In *Johnson v. Massachusetts*, 390 U. S. ——; 20 L. Ed. 2d 69; 88 S. Ct. 1155 (decided April 1, 1968) this court dismissed as improvidently granted a writ of certiorari because the record was "insufficient to permit decision" of constitutional claims of involuntariness of a confession used in a murder case resulting

in the death penalty. The record in that case of facts already developed was much more extensive than in the case at bar, and the issue there was not "premature." In the case at bar the petitioner alleges what the facts will be shown to be in the future, and is therefore less sufficient than in *Johnson v. Massachusetts*, supra. Of course the facts in *Johnson v. Massachusetts*, supra, could be developed later by the *habeas corpus* or other post conviction procedure, and could be developed in the case at bar by proceedings in the state court. Thus, petitioners here and in *Johnson v. Massachusetts*, supra, will each have ultimate judicial determination of their constitutional claims upon adequate records developed in the trial courts. The writ of certiorari herein should be dismissed.

VI

Facts Should Be Developed In State Court

In *Pollard v. United States*, supra, this court held that whether delay amounts to denial of constitutional rights "depends upon the circumstances." And in *United States v. Ewell*, supra, claims by the prisoner that the delay would result in "possible prejudice" was held to be "insubstantial, speculative and premature." A trial now in state court with appellate review (if conviction results), together with post-conviction relief in federal courts, could all be terminated long before petitioner's remaining portion of his federal sentence is served. The state court should be allowed to develop the facts and circumstances upon which to decide whether the delay "amounts to an unconstitutional deprivation of rights," *Pollard v. United States*, supra. Of course, if the petitioner (defendant) is acquitted in the state court the question would no longer exist.

PRAYER

WHEREFOR, respondents (Judge and District Attorney) respectfully pray that since the record herein is "insufficient to permit decision" herein, the writ of certiorari be dismissed as improvidently granted, or that the cause be remanded to the Supreme Court of Texas for proceedings therein or in the state trial court for development of the facts, or in the alternative that all relief prayed for by petitioner herein be denied.

Respectfully submitted,

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Joe S. Moss, Assistant District Attorney of Harris County, Texas, one of the attorneys for respondents, certify that a copy of the above and foregoing Brief of Respondents has been served upon Petitioner and the Solicitor General by depositing same in the United States Mail, Certified, Air Mail Postage Prepaid, addressed to each as follows:

Mr. Charles Alan Wright
Yale Law School
New Haven, Connecticut 06521

Office of the Solicitor General
Department of Justice
Washington, D. C. 20530

this the [illegible] day of November, A. D. 1968.

APPENDIX

Penal Code of Texas of 1925, as amended

Article 302—Perjury

Perjury is a false statement made, relating to something past or present, under the sanction of an oath, or such affirmation as is by law equivalent to an oath, where such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or is necessary for the ends of public justice, or is necessary for the conduct of any official hearing, inquiry, meeting, or investigation by any legislative committee or other instrumentality of government having legal authority to issue process for the attendance of witnesses, whether or not such process was in fact issued. (As amended by *General and Special Laws of Texas,* Acts 1961, 57th Leg., p. 654, ch. 303, #22)

Code of Criminal Procedure of Texas of 1965

Article 13.01—Offenses Not Committed In The State

Prosecutions for offenses committed wholly or in part without, and made punishable by law within this State, may be begun and carried on in any county in which the offender is found.

Article 13.04—Perjury and False Swearing

Perjury and false swearing may be prosecuted in the county where committed, or in the county where the false statement is used or attempted to be used.

Rule 145. Affidavit of Inability

A party who is required to give security for costs may file with the clerk or justice of the peace an affidavit that he is too poor to pay the costs of court and is unable to give security therefor; and the clerk or justice shall issue process and perform all other services required of him, in the same manner as if the security had been given. Any party to the suit, or the clerk or justice, shall have the right to contest such affidavit. Such contest may be tried before the trial of the cause, at such time as the court may fix, at the term of court at which the affidavit is filed, after notice thereof has been given to the opposite party or his attorney of record. In the event a contest is filed, the burden shall be on the affiant to prove his alleged inability in open court by evidence other than by the affidavit above referred to.

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1968.

Richard M. Smith, Petitioner, v. Fred M. Hooey, Judge, Criminal District Court of Harris County, Texas.	On Writ of Certiorari to the Supreme Court of Texas.

[January 20, 1969.]

Mr. Justice Stewart delivered the opinion of the Court.

In *Klopfer* v. *North Carolina*, 386 U. S. 213, this Court held that, by virtue of the Fourteenth Amendment, the Sixth Amendment right to a speedy trial[1] is enforceable against the States as "one of the most basic rights preserved by our Constitution." *Id.*, at 226. The case before us involves the nature and extent of the obligation imposed upon a State by that constitutional guarantee, when the person under the state criminal charge is serving a prison sentence imposed by another jurisdiction.

In 1960 the petitioner was indicted in Harris County, Texas, upon a charge of theft. He was then, and still is, a prisoner in the federal penitentiary at Leavenworth, Kansas.[2] Shortly after the state charge was filed against him, the petitioner mailed a letter to the Texas trial court requesting a speedy trial. In reply, he was notified that "he would be afforded a trial within two weeks of any date [he] might specify at which he could be pres-

[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U. S. Const., Amend. VI.

[2] On May 5, 1960, the sheriff of Harris County notified the warden at Leavenworth that a warrant for the petitioner's arrest was outstanding, and asked for notice of "the minimum release date." That date is apparently January 6, 1970.

ent."[3] Thereafter, for the next six years, the petitioner, "by various letters, and more formal so-called 'motions,'" continued periodically to ask that he be brought to trial. Beyond the response already alluded to, the State took no steps to obtain the petitioner's appearance in the Harris County trial court. Finally, in 1967, the petitioner filed in that court a verified motion to dismiss the charge against him for want of prosecution. No action was taken on the motion.

The petitioner then brought a mandamus proceeding in the Supreme Court of Texas, asking for an order to show cause why the pending charge should not be dismissed. Mandamus was refused in an informal and unreported order of the Texas Supreme Court. The petitioner then sought certiorari in this Court. After inviting and receiving a brief from the Solicitor General of the United States, 390 U. S. 937, we granted certiorari to consider the constitutional questions this case presents. 392 U. S. 925.

In refusing to issue a writ of mandamus, the Supreme Court of Texas relied upon and reaffirmed its decision of a year earlier in *Cooper* v. *State*, 400 S. W. 2d 890.[4] In that case, as in the present one, a state criminal charge was pending against a man who was an inmate of a federal prison. He filed a petition for a writ of habeas corpus *ad prosequendum* in the Texas trial court, praying that he be brought before the court for trial, or that the charge against him be dismissed. Upon denial of that motion, he applied to the Supreme Court of Texas for a writ of mandamus. In denying the application, the court acknowledged that an inmate of a *Texas* prison would have been clearly entitled to the relief sought as

[3] Most of the facts have been stipulated.

[4] See also *Lawrence* v. *State*, 412 S. W. 2d 40.

a matter of constitutional right,' but held that "a different rule is applicable when two separate sovereignties are involved." 400 S. W. 2d, at 891. The court viewed the difference as "one of power and authority." *Id.*, at 892. While acknowledging that if the state authorities were "ordered to proceed with the prosecution . . . and comply with certain conditions specified by the federal prison authorities, the relator would be produced for trial in the state court," *id.*, at 891, it nonetheless denied relief, because it thought "[t]he true test should be the power and authority of the state unaided by any waiver, permission or act of grace of any other authority." *Id.*, at 892. Four Justices dissented, expressing their belief that "where the state has the power to afford the accused a speedy trial it is under a duty to do so." *Id.*, at 893.

There can be no doubt that if the petitioner in the present case had been at large for a six-year period fol-

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[5] For this proposition the court cited its 40-year-old decision in *Moreau* v. *Bond*, 114 Tex. 468, 271 S. W. 379. The court in that case said:

"Those rights, fundamental in their nature, which have been guaranteed by the Bill of Rights cannot be the subject of judicial discretion. Judicial discretion is a legal discretion and not a personal discretion—a legal discretion to be exercised in conformity to the Constitution and the laws of the land. It is only in the absence of positive law or fixed rule that the judge may decide by his view of expediency or of the demands of justice or equity. The Bill of Rights (sec. 10 of article 1 of the Constitution) provides: 'In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury' . . .

"None of the reasons suggested, either in the order overruling relator's motion for trial or in the answer to the petition for mandamus here, are good or have any foundation in law or justice. Certainly, under our Constitution and our laws, the relator is entitled to a trial on the charge against him." 114 Tex., at 470, 271 S. W., at 379-380.

The basis of the decision thus appears to have been the speedy trial guarantee contained in the state constitution.

lowing his indictment, and had repeatedly demanded that he be brought to trial, the State would have been under a constitutional duty to try him. *Klopfer* v. *North Carolina*, 386 U. S., at 219. And Texas concedes that if during that period he had been confined in a Texas prison for some other state offense, its obligation would have been no less. But the Texas Supreme Court has held that because petitioner is, in fact, confined in a federal prison, the State is totally absolved from any duty at all under the constitutional guarantee. We cannot agree.

The historic origins of the Sixth Amendment right to a speedy trial were traced in some detail by THE CHIEF JUSTICE in his opinion for the Court in *Klopfer*, 386 U. S., at 223–226, and we need not review that history again here. Suffice it to remember that this constitutional guarantee has universally[*] been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: "[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell*, 383 U. S. 116, 120. These demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction.

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result

[*] "Today, each of the 50 States guarantees the right to a speedy trial to its citizens." *Klopfer* v. *North Carolina*, 386 U. S. 213, 226; see Note, The Right to a Speedy Criminal Trial, 57 Colum. L. Rev. 846, 847 (1957); cf. Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587 (1965).

in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed.[7] Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.[8]

And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a pris-

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[7] See Schindler, "Interjurisdictional Conflict and the Right to a Speedy Trial, 35 U. Cin. L. Rev. 179, 182–183 (1966).

[8] See, *e. g.*, *Evans* v. *Mitchell*, 200 Kan. 290, 436 P. 2d 408 (holding that Kansas had no duty to bring to trial a person serving a 15-year sentence in a Washington prison, although the pendency of the Kansas charge prevented any possibility of clemency or conditional pardon in Washington and made it impossible for the prisoner to take part in certain rehabilitation programs or to become a trusty in the Washington prison). The existence of an outstanding criminal charge no longer automatically makes a prisoner ineligible for parole in the federal prison system. 28 CFR § 2.9 (1968); see Rules of the United States Board of Parole 17–18 (1965). But as late as 1959 the Director of the Federal Bureau of Prisons wrote: "Today the prisoners with detainers are evaluated individually but there remains a tendency to consider them escape risks and to assign them accordingly. In many instances this evaluation and decision may be correct, for the detainer can aggravate the escape potentiality of a prisoner." Bennett, "The Last Full Ounce," 23 Federal Probation, No. 2, at 20, 21 (1959). See also Note, Detainers and the Correctional Process, 1966 Wash. U. L. Q. 417, 418–423.

oner as upon a person who is at large. Cf. *Klopfer* v. *North Carolina*, *supra*, at 221–222. In the opinion of the former Director of the Federal Bureau of Prisons,

> "[I]t is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination towards self-improvement." [9]

Finally, it is self-evident that "the possibilities that long delay will impair the ability of an accused to defend himself" are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while "evidence and witnesses disappear, memories fade, and events lose their perspective," [10] a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.

Despite all these considerations, the Texas Supreme Court has said that the State is under no duty even to attempt to bring a man in the petitioner's position to trial, because "[t]he question is one of power and authority and is in no way dependent upon how or in what

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[9] Bennett, *supra*, n. 8, at 21; see Walther, Detainer Warrants and the Speedy Trial Provision, 46 Marq. L. Rev. 423, 427–428 (1963).

[10] Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions, 77 Yale L. J. 767, 769 (1968).

manner the federal sovereignty may proceed in a discretionary way under the doctrine of comity."[11] Yet Texas concedes that if it did make an effort to secure a federal prisoner's appearance, he would, in fact, "be produced for trial in the state court."[12] This is fully confirmed by the brief that the Solicitor General has filed in the present case:

> "[T]he Bureau of Prisons would doubtless have made the prisoner available if a writ of habeas corpus *ad prosequendum* had been issued by the state court. It does not appear, however, that the State at any point sought to initiate that procedure in this case."[13]

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[11] *Cooper* v. *State*, 400 S. W. 2d 890, 892. The only other basis suggested by the Texas Supreme Court for its denial of relief in *Cooper* was the expense that would be involved in bringing a federal prisoner to trial, the court noting that a directive of the Federal Bureau of Prisons provided that "satisfactory arrangements for payment of expenses [must be] made before the prisoner is actually removed to the place of trial." *Id.*, at 891. But the expense involved in effectuating an occasional writ of habeas corpus *ad prosequendum* would hardly be comparable to what is required to implement other constitutional rights, *e. g.*, the appointment of counsel for every indigent defendant. *Gideon* v. *Wainwright*, 372 U. S. 335. And custodial as well as transportation expenses would also be incurred if the State brought the petitioner to trial after his federal sentence had run. If the petitioner is, as the State maintains, not an indigent, there is nothing to prevent a fair assessment of necessary expenses against him. Finally, the short and perhaps the best answer to any objection based upon expense was given by the Supreme Court of Wisconsin in a case much like the present one: "We will not put a price tag upon constitutional rights." *State ex rel. Fredenberg* v. *Byrne*, 20 Wis. 2d 504, 512, 123 N. W. 2d 305, 310.

[12] *Cooper* v. *State*, *supra*, at 891.

[13] That brief also states:

"It is the policy of the United States Bureau of Prisons to encourage the expeditious disposition of prosecutions in state courts against federal prisoners. The normal procedure under which pro-

In view of these realities, we think the Texas court was mistaken in allowing doctrinaire concepts of "power" and "authority" to submerge the practical demands of the constitutional right to a speedy trial. Indeed, the rationale upon which the Texas Supreme Court based its denial of relief in this case was wholly undercut last Term in *Barber* v. *Page*, 390 U. S. 719. In that case we dealt with another Sixth Amendment guarantee—the right of confrontation. In holding that Oklahoma could not excuse its failure to produce a prosecution witness simply because he was in a federal prison outside the State, we said:

> "We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma. It must be acknowledged that various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing

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duction is effected is pursuant to a writ *ad prosequendum* from the state court. Almost invariably, the United States has complied with such writs and extended its cooperation to the state authorities. The Bureau of Prisons informs us that removals are normally made by United States marshals, with the expenses borne by the state authorities. In some instances, to mitigate the cost to the State, the Bureau of Prisons has removed an inmate to a federal facility close to the site of prosecution. In a relatively small number of instances, prisoners have been produced pursuant to 18 U. S. C. § 4085, which provides in part:

"Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such a person, prior to his release, to be transferred to a penal or correctional institution within such State or District."

with confrontation on the theory that it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.' 5 Wigmore, Evidence § 1404 (3d ed. 1940).

"Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the State and the Federal Government has largely deprived it of any continuing validity in the criminal law. . . .

"The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' 381 F. 2d, at 481. In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." 390 U. S., at 723–725 (footnotes omitted).

By a parity of reasoning we hold today that the Sixth Amendment right to a speedy trial may not be dispensed with so lightly either. Upon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial.

The order of the Supreme Court of Texas is set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the opinion and judgment of the Court, but he would make it absolutely clear to the Supreme Court of Texas that so far as the federal constitutional question is concerned its judgment is set aside only for the purpose of giving the petitioner a trial, and that if a trial is given the case should not be dismissed.

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1968.

Richard M. Smith, Petitioner, v. Fred M. Hooey, Judge, Criminal District Court of Harris County, Texas.	On Writ of Certiorari to the Supreme Court of Texas.

[January 20, 1969.]

Mr. Justice White, concurring.

I join the opinion of the Court, understanding its remand of the cause "for further proceedings not inconsistent with this opinion" to leave open the ultimate question whether Texas must dismiss the criminal proceedings against the petitioner. The Texas court's erroneous reliance on the fact of incarceration elsewhere prevented it from reaching the other facets of this question, which may now be adjudicated in the manner permitted by Texas procedure.

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1968.

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v.
Fred M. Hooey, Judge, Criminal District Court of Harris County, Texas.

On Writ of Certiorari to the Supreme Court of Texas.

[January 20, 1969.]

Separate opinion of Mr. Justice Harlan.

I agree that a State may not ignore a criminal accused's request to be brought to trial, merely because he is incarcerated in another juriadiction, but that it must make a reasonable effort to secure his presence for trial. This much is required by the Due Process Clause of the Fourteenth Amendment, and I would rest decision of this case on that ground, and not on "incorporation" of the Sixth Amendment's speedy trial provision into the Fourteenth. See my opinion concurring in the result in *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (1967).

I believe, however, that the State is entitled to more explicitness from us as to what is to be expected of it on remand than what is conveyed merely by the requirement that further proceedings not be "inconsistent with this opinion." Must the charges against petitioner be dismissed? Or may Texas now secure his presence and proceed to try him? If petitioner contends that he has been prejudiced by the nine-year delay, how is this claim to be adjudicated?

This case is one of first impression for us, and decides a question on which the state and lower federal courts have been divided. Under these particular circumstances, I do not believe that Texas should automatically

forfeit the right to try petitioner. If the State still desires to bring him to trial, it should do so forthwith. At trial, if petitioner makes a *prima facie* showing that he has in fact been prejudiced by the State's delay, I would then shift to the State the burden of proving the contrary.